Filed 10/16/12 P. v. Landa CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL RUIZ LANDA, Defendant and Appellant.	E053154 (Super.Ct.No. FVA1001782) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed with directions.

Gregory S. Cilli, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Rafael Ruiz Landa appeals from his conviction of possession of methamphetamine for sale (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). He contends: (1) the trial court erred by failing to instruct the jury sua sponte about the defense of mistake of fact; (2) the case should be remanded with directions to the trial court to specify the number of days of conduct credit awarded; (3) the processing fee under Penal Code section 1205, subdivision (d) should be stricken; (4) the trial court erred in failing to provide him a hearing under Penal Code section 1203.1b to determine his ability to pay a $505 fee for presentence investigation and probation report preparation; and (5) the minutes of the sentencing hearing should be amended to reflect that the trial court stayed the restitution fine under Penal Code section 1202.4. The People agree that remand is necessary for the trial court to determine defendant's conduct credits; the processing fee under Penal Code section 1205, subdivision (d) must be stricken; and the minute order for the sentencing hearing must be amended to reflect that the restitution fine was stayed. On our own motion, we have determined that the trial court erred in staying the facilities assessment fee and court security fee for count 2. We find no other prejudicial errors.

II. FACTS AND PROCEDURAL BACKGROUND

At about 2:00 a.m. on November 15, 2010, Fontana Police Officer Samuel Siggson noticed a car stopped in the middle of the street about a car length back from the stop sign at an intersection. The car's headlights were on, and the car had no front license plate. Officer Siggson drove toward the car, and it moved in reverse a few car

lengths and parked in front of a driveway. Defendant, the only person in the car, got out and walked down the street.

Officer Siggson drove up next to defendant, got out of his car, and asked defendant if he lived nearby. Defendant said he did not. He was fidgety, spoke rapidly, and was sweating even though it was cold outside. The officer asked defendant for his driver's license, and defendant instead produced a Mexican identification card. Defendant said the car belonged to his wife. He denied the car contained any contraband, and he consented to a search of the car.

During the search, Officer Siggson found two plastic baggies inside an Ice Breakers mint container on the front passenger seat. One of the baggies was protruding from the container. One baggie contained 4.86 grams of crystal-form methamphetamine; the other contained 0.77 grams of powder-form methamphetamine. Officer Siggson testified that a typical dose of methamphetamine would be from 0.1 to 0.2 grams. Defendant had $442 on his person, including three $100 bills, five $20 bills, four $5 bills, and twenty-two $1 bills. The officer did not find any paraphernalia for using methamphetamine.

Officer Siggson believed defendant possessed the methamphetamine for sale, because defendant did not explain why he was in the area at that time of night or why he left the car when the officer approached. In addition, defendant appeared nervous; users normally do not have the amount of methamphetamine that defendant had, and defendant did not have any paraphernalia for using the drug. Finally, a street-level narcotics dealer would typically carry larger bills as a result of sales and smaller bills for change,

consistent with the denominations defendant was carrying. The value of the methamphetamine was between $600 and $1,200.

Defendant's wife testified she had found the mint container in a camping trailer in the back of her house in October or November 2010, and she had put it on the passenger seat of her car the same night defendant was driving the car. The car was registered as non-operable, and she did not tell anyone she had put it there. She did not give defendant permission to drive the car. She knew the container had drugs in it, in two separate baggies, but she did not get rid of it because she did not know whether her brothers or their friends owned the drugs, and she did not want to have to pay for the drugs. Two or three days earlier, she had given defendant four $100 bills to buy food for their horses and other animals and for his own spending. Defendant and other family members had access to the trailer where the drugs had been found. When the wife was asked in cross-examination if she knew who the drugs belonged to, the following colloquy occurred:

"Q You don't know that they weren't your husband's, do you?

"A He doesn't do drugs. He doesn't sell drugs. I would say they weren't his.

"Q But you don't know if they were his drugs, do you?

"A No.

"Q It's possible he was hiding those drugs from you, isn't it?

"A He doesn't hide things from me, so I don't think so."

The jury found defendant guilty of possession of methamphetamine for sale (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)).

The trial court placed defendant on probation for three years. With respect to fines and fees, the trial court made the following findings: "$70 court security fee. I'm going to impose and stay the $70 security fee. I'll impose for Count 1 and Count 2, I'll impose and stay. It will be pursuant to 654 on that since I think the counts are related, and it might constitute a dual punishment. [¶] And then I'll go ahead and strike the attorney's fees. I'll impose the PSI fee, which is 505. Strike the booking fees. I'll strike the supervision fees, as the defendant's probably going to be deported, so it's not really going to cost probation much money to supervise him. I'll reduce the payment schedule to $25 a month beginning 90 days from release of custody. . . . 1202.4 and .44 fines of 200 are imposed and stayed. The .44 is pending successful completion of probation." In addition, among the conditions of probation were the conditions that defendant pay "a $35.00 processing fee pursuant to PC 1205(d)" and "[p]ay a restitution fine in the amount of $200.00 . . . ."

III. DISCUSSION

A. Jury Instructions

Defendant contends the trial court erred by failing to instruct the jury sua sponte about the defense of mistake of fact.[1]

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[1] CALCRIM No. 3406, the standard instruction on mistake of fact, provides: "The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact. [¶] If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <*insert crime[s]*>. [¶] If you find that the defendant believed that _____ <*insert alleged mistaken facts*> [and if you find that belief was

[footnote continued on next page]

The trial court must instruct the jury sua sponte on general principles of law relevant to the issues raised by the evidence. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) If it appears that the defendant is relying on a particular defense, or substantial evidence supports such a defense and the defense is consistent with the defendant's theory of the case, the trial court must instruct on the defense even in the absence of a request. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) Evidence is substantial if it would be sufficient to raise a reasonable doubt about the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

Here, defendant's wife testified she had placed the mint container in the car defendant was driving without telling him, and defendant had taken the car without her knowledge. Defendant consented to a search of the car after telling Officer Siggson the car did not contain any contraband. After the presentation of evidence, defense counsel moved to dismiss the charges on the ground there was no evidence defendant knew of the presence of the drugs or knew of their nature as a controlled substance. We will assume for purposes of argument that the evidence supported an instruction on the defense of mistake of fact.

[footnote continued from previous page]

reasonable], (he/she) did not have the specific intent or mental state required for _____ <*insert crime[s]*>. [¶] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <*insert crime[s]*>, you must find (him/her) not guilty of (that crime/those crimes)."

We review error in failing to instruct on the mistake-of-fact defense under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1431.) "'[A] failure to instruct where there is a duty to do so can be cured if it is shown that "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." [Citation.]' [Citation.]" (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849.) Here, the jury was instructed that to find defendant guilty of possession for sale of methamphetamine, it had to find, among other things, that "1. The defendant possessed a controlled substance; [¶] 2. The defendant knew of its presence; [and] [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; . . . ." The jury was instructed that to find defendant guilty of transporting methamphetamine, it had to find, among other things, that "1. The defendant transported a controlled substance; [¶] 2. The defendant knew of its presence; [and] [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; . . . ."

Thus, under the instructions given, the jury could not have convicted defendant of either charge without affirmatively finding that he knew of the presence of the methamphetamine and knew of its nature and character as a controlled substance. Any error in failing to instruct the jury on mistake of fact was harmless. (*Watson, supra,* 46 Cal.2d at p. 836.)

B. Conduct Credits

Defendant contends the case should be remanded with directions to the trial court to specify the number of days of conduct credit awarded under Penal Code section 4019. The People concede error.

A defendant sentenced to prison is entitled to credit against his term for all actual days of presentence custody attributable to his crime. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) In addition, Penal Code section 4019 provides that the defendant may earn conduct credit for good behavior and for satisfactory performance of any labor assigned to him while in presentence custody. (Pen. Code, § 4019, subds. (b), (c).) The court imposing sentence must determine the number of days the defendant has been in custody and must add applicable conduct credits, and "reflect the total in the abstract of judgment." (*People v. Buckhalter, supra,* at p. 30.) Because the trial court failed to do so, we will remand the matter for the trial court to calculate and specify the number of days of conduct credit to which defendant is entitled.

C. Processing Fee

Defendant contends, and the People agree, that the $35 processing fee under Penal Code section 1205, subdivision (d) should be stricken. Penal Code section 1205, subdivision (d) authorizes a fee for the processing of installment accounts for the payment of fines and fees. However, under Penal Code section 1205, subdivision (e), such a fee applies only "if the defendant has defaulted on the payment of other fines." Defendant has not defaulted on another fine, so, by its terms, the statute authorizing the

processing fee is inapplicable. (Pen. Code, § 1205, subds. (d), (e).) We therefore accept the People's concession of error and will order the $35 processing fee stricken.

D. Hearing on Ability to Pay

The trial court ordered defendant to pay $505 under Penal Code section 1203.1b for the costs of presentencing investigation and preparation of the probation report. Defendant contends the trial court erred in failing to hold a hearing on his ability to pay those costs.

1. Additional Background

The probation report noted that defendant received $800 per month from self-employment in construction. and that he was "also capable of obtaining employment . . . ." He had over $400 in cash when he was arrested.

The probation report listed all the fees defendant would be required to pay, and the probation officer recommended "that the court finds that the defendant has the present ability to pay the cost of conducting the pre-sentence investigation and preparing the report pursuant to Section 1203.1(b) of the Penal Code."

At the sentencing hearing, defense counsel requested the trial court to consider dismissing or reducing some of the fees but did not specifically ask for a hearing on ability to pay. Defense counsel stated, "As far as the probation memo, fines and fees, we'd ask the Court to reduce all fines and fees within its discretion. Specifically, we'd ask the Court to strike the reimbursement of appointed counsel fees. We'd ask the court to strike the reimbursement of investigation cost and reimbursement of supervision fees and also reduce the payment schedule to offset any reductions that the Court decides to

reduce. . . . And to reduce the restitution fine in Term 25 to the minimum." The trial court responded, "I'll change Term 22 [*sic*] as requested because that may be a fair thing if he's not able to make payments or something.

2. Forfeiture

The People contend defendant forfeited his contention by failing to object at the sentencing hearing. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1076 (*Valtakis*) [holding that a challenge to the imposition of probation costs was forfeited when defendant failed to object to the fees at sentencing and had initialed a provision on a plea entry form acknowledging he would be subjected to fines and other penalties.] Here, however, defense counsel did request the trial court to strike the investigative costs, and we will therefore address the issue on the merits.

3. Analysis

In *Valtakis*, the court held in the alternative that even if the defendant had not forfeited his challenge, the error in failing to determine his ability to pay was not prejudicial. (*Valtakis*, *supra*, 105 Cal.App.4th at p. 1076.) The court noted that the defendant had $255 on his person when he was arrested; he was working part time and living with his mother, and he was not incapacitated. The court concluded that it was unlikely the trial court would have found he lacked the ability to pay a $250 probation service fee, even considering that the trial court had imposed $540 in other fees. (*Ibid.*) The court further noted that the defendant had other statutory remedies, including an additional hearing on his ability to pay during his probationary period and modification

of judgment on a showing of changed circumstances. (*Valtakis*, *supra*, at p. 1076, citing Pen. Code, § 1203.1b, subds. (c), (f).)

Here, defendant had $442 on his person when arrested, and he reported income of $800 per month from construction jobs. The other fines and fees imposed (after the modifications we order on appeal) totaled less than $300. Here, as in *Valtakis*, we conclude defendant suffered no prejudice from the trial court's failure to conduct a hearing on his ability to pay, and should defendant's circumstances change, he may pursue his other remedies under Penal Code section 1203.1b, subdivisions (c) and (f).

E. Restitution Fine

Defendant contends the minutes of the sentencing hearing should be amended to reflect that the trial court stayed the restitution fine under Penal Code section 1202.4. At the sentencing hearing, the trial court orally imposed and stayed a restitution fine under Penal Code section 1202.4, subdivision (b). However, the clerk's minutes of the hearing do not reflect the stay. The People concede error.

Although a restitution fine is mandatory under Penal Code section 1202.4, subdivision (b), unless the trial court "finds compelling and extraordinary reasons for not doing so, and states those reasons on the record," and the trial court here failed to state such reasons, the People have forfeited any challenge to the error by their failure to object in the trial court. (*People v. Tillman* (2000) 22 Cal.4th 300, 303.) We will therefore order the minute order for the sentencing hearing to be corrected to reflect that the restitution fine under Penal Code section 1202.4, subdivision (b) is stayed.

F. Other Fees and Assessments

Although neither party has raised the issue, we note the trial court stayed the facilities assessment and court security fees for count 2, citing Penal Code section 654. The facilities assessment fee (Gov. Code, § 70373, subd. (a)(1)) and court security fee (Pen. Code, § 1465.8, subd. (a)(1)) are mandatory, and the trial court had no authority to stay those fees. (*People v. Woods* (2010) 191 Cal.App.4th 269, 272 and cases collected.) Moreover, the fees are mandatory for *each* count of which a defendant is convicted even if sentence for a count is stayed under section 654, because the fees are not punitive in nature. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 865-870.)

A trial court's failure to impose a mandatory fee results in an illegal sentence, and when we discover an illegal sentence during the pendency of an appeal, we affirm the conviction and remand for a proper sentence. (*People v. Woods*, *supra*, 191 Cal.App.4th at pp. 272-273.)[2] We will therefore direct the trial court on remand to lift the stay on the facilities assessment and court security fees as to count 2.

IV. DISPOSITION

The trial court is directed to impose a Penal Code section 1465.8, subdivision (a)(1) court security fee and a Government Code section 70373, subdivision (a)(1) facilities assessment fee as to count 2. In addition, the minute order for the sentencing

[2] Our determination that error in failure to impose the facilities assessment and court security fees must be corrected on appeal differs from our treatment of the trial court's failure to state reasons for staying the restitution fine, because the former fees are mandatory under all circumstances, whereas, the latter is subject to the trial court's discretion in certain circumstances. (See *People v. Tillman*, *supra*, 22 Cal.4th at p. 303.)

hearing shall be corrected to reflect that the restitution fine under Penal Code section 1202.4, subdivision (b)(1) is stayed and that the $35 processing fee under Penal Code section 1205, subdivision (d) is stricken. The terms and conditions of probation are to be corrected accordingly. The trial court is to determine the number of days of conduct credit to which defendant is entitled. In all other respects, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.